



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified International Sciences
Corporation

File: B-259925

Date: May 10, 1995

William B. Barton, Jr., Esq., Barton, Mountain & Tolle, for the protester.
Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for Fortier & Associates, Inc., an interested party.
Richard J. McCarthy, Esq., Department of Transportation, for the agency.
Robert Arsenoff, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that agency should have disqualified awardee as the result of conflicts of interests is denied where agency reasonably found that no conflicts existed.
2. Agency reasonably concluded that awardee's proposal for part-time program management at a cost below the government estimate was acceptable where the solicitation did not prohibit such feature.
3. Agency reasonably credited awardee for the experience of its subcontractor where the solicitation did not preclude consideration of such experience.
4. Protest allegation that awardee impermissibly substituted key personnel at the outset of contract performance is denied where there is no evidence that awardee deliberately proposed personnel it did not intend to provide and awardee's substitutions conformed to the solicitation provision governing the matter.

DECISION

Diversified International Sciences Corporation (DISC) protests the award of a contract to Fortier & Associates, Inc. under request for proposals (RFP) No. DTFA01-93-R-11337, issued by the Department of Transportation, Federal Aviation Administration (FAA) as a competitive section 8(a) set-aside for software support services at three air traffic control facilities. DISC

alleges that employees of the awardee had conflicts of interests which required disqualification of the firm from the competition, that Fortier's proposal should have been rejected as unacceptable because it underestimated the number of hours required for program management and failed to meet the RFP's experience requirements, and that the awardee engaged in "bait and switch" tactics by proposing key personnel it did not intend to provide during contract performance.

We deny the protest.

BACKGROUND

The RFP was issued on July 12, 1994, contemplating a cost-plus-fixed-fee and time-and-materials contract. Offerors were to submit a technical proposal, a business management proposal, and a cost proposal. Award was to be made to the low-cost offeror submitting an acceptable technical and business management proposal.

The RFP provided that technical proposals would be evaluated on a pass/fail basis taking into consideration nine specific factors which were listed in descending order of importance. Business management proposals were to be similarly evaluated taking into consideration four factors listed in descending order of importance.

Three proposals were received by the August 16 closing time. DISC, which proposed Computer Sciences Corporation as a subcontractor, and Fortier, which proposed Hughes Aircraft Company as a subcontractor, were determined to have submitted acceptable proposals. On October 20, 1994, the FAA issued a letter indicating that some offerors had proposed fewer labor hours than the government estimate and invited revised cost proposals. All offerors declined to amend their proposals. On December 28, award was made to Fortier on the basis of its low cost of \$2,396,782 compared to DISC's price of \$2,882,176.

PROTEST AND ANALYSIS

Alleged Conflict of Interest

DISC initially suggested that a former FAA employee's subsequent employment with Fortier's subcontractor, Hughes, violated procurement integrity statutes and constituted a conflict of interest which required the agency to disqualify Fortier from competing.

DISC also alleged that RMS Technologies, Inc., an FAA management subcontractor with access to proprietary cost information of the incumbent protester's, may have shared

such information with Fortier and assisted the firm in the preparation of its proposal.

A contracting officer may protect the integrity of the procurement system by disqualifying an offeror where the firm may have obtained an unfair competitive advantage if the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638. In making such judgments, contracting officers are granted wide latitude to exercise business judgment. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63. Accordingly, the responsibility for determining to what extent a firm should be excluded from competition rests with the procuring agency and our Office will overturn such a determination only when it is found to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629.

Here, in response to the protester's allegations, the agency presented evidence, including sworn statements, indicating that the former FAA employee was not a procurement official, was not associated with the agency's activity conducting the procurement, had been cleared by an agency ethics officer for employment with Hughes and only cursorily reviewed Fortier's proposal before it was submitted. With respect to RMS, the agency presented evidence that RMS officials were obligated not to, and have not, disseminated DISC cost information, and that RMS neither has any close business relationship with Fortier, nor has participated in any manner in the preparation of Fortier's proposal.

In its protest comments, DISC expresses its continuing dissatisfaction on this issue, but concedes that "the new evidence does tend to show, with regard to [the FAA employee] and RMS, that no explicit conflict of interest violations occurred. . . ." While DISC invites our Office to substitute our assessment of the potential for conflict for that of the FAA, that is not the standard of review; in relevant measure, the record provides no basis to find the agency's determination unreasonable.

Fortier's Allegedly Unacceptable Proposal

DISC alleges that Fortier's business management proposal should not have been found acceptable. The RFP provided for evaluation of the business management proposal to determine the offeror's ability and willingness to devote the necessary resources and expertise to the work required by the solicitation to ensure successful completion of the contract. Four specific evaluation factors were set forth.

DISC maintains that Fortier should have been found unacceptable under the least important listed factor which

concerned understanding and satisfying resource requirements. DISC asserts that Fortier "grossly underestimated" the number of hours which would have to be provided for program management, and that this underestimate caused the FAA's October 20 letter inviting offerors to reexamine labor hours proposed, and giving offerors an opportunity to revise their cost proposals.¹ DISC--the incumbent--asserts that program management is an important part of the contract effort.

DISC also maintains that Fortier does not itself possess certain required direct experience and instead relies on its subcontractor, Hughes, for that experience. In this regard, Fortier objected to the agency's decision to give Fortier evaluation credit for Hughes's concededly acceptable past experience noting that of the three sample contracts listed by the awardee in its proposal, one was Fortier's and two others were Hughes's and noting further that Hughes alone possessed experience which was required with respect to specified software programs.

In reviewing protests concerning the evaluation of proposals, we will examine the agency's evaluation to ensure that it had a reasonable basis and was consistent with the RFP evaluation criteria. RCA Serv. Co.; et al., B-218191; B-218191.2, May 22, 1985, 85-1 CPD ¶ 585. The fact that a protester does not agree with the agency's evaluation does not render the evaluation unreasonable. Logistic Servs. Int'l, Inc., B-218570, Aug. 15, 1985, 85-2 CPD ¶ 173. Further, it is well established that the experience of a proposed subcontractor properly may be considered in determining whether an offeror meets an experience requirement in the solicitation unless the evaluation plan prohibits such consideration. Commercial Bldg. Serv., Inc., B-237865.2; B-237865.3, May 16, 1990, 90-1 CPD ¶ 473.

The record shows that DISC proposed full-time program management plan for 2,298 hours at a cost of \$106,207, while Fortier proposed a part-time program with 960 hours at a cost of \$36,121. While DISC alleges that Fortier "grossly underestimated" the number of hours required for program management when compared to the FAA's cost estimate of \$100,000, the agency points out that the RFP did not preclude part-time program management and further points out that the function has been completely eliminated from DISC's current contract by amendment. Under these circumstances, there is no basis to conclude that the agency acted unreasonably in accepting Fortier's proposed number of

¹As the FAA points out, in fact, the October 20 letter was predicated on the agency's determination that both offerors may have underestimated the number of labor hours required.

program management hours. Accordingly, we deny this aspect of the protest. Logistics Servs. Int'l, Inc., supra.

We likewise deny DISC's allegation that the agency improperly considered Hughes's experience in assessing the acceptability of Fortier's business management proposal. As the RFP states, the overall purpose of evaluating business management proposals was to determine the offeror's "ability . . . to devote necessary resources and expertise" to the work required by the RFP. Consideration of subcontracting resources is nowhere precluded by the RFP and, in fact, both offerors proposed to use subcontractors. In this context, we do not find, as the protester urges, that the RFP's use of the words "direct experience" precludes consideration of subcontractor experience. Rather, we think the direct program experience of either the prime contractor or subcontractor could be considered. Accordingly, the agency properly considered Hughes's concededly acceptable experience during its evaluation. Commercial Bldg. Serv., Inc., supra.


Personnel Substitutions

The RFP required offerors to identify a minimum of two key personnel including the program manager and a senior leader. Substitutions were precluded for the first year of performance unless necessitated by specified reasons including termination of employment, and required approval by the contracting officer. Fortier chose to identify seven key personnel and supplied resumes and letters of commitment for all individuals who did not actually work for the firm. Fortier also submitted an additional 13 representative resumes and similar commitment letters. When performance began, Fortier had replaced two employees who had been listed key personnel, neither of whom was in one of the positions required to be listed as key by the RFP. DISC alleges that Fortier engaged in an impermissible "bait and switch" tactic, and never intended to provide all the individuals it identified as key to the contract effort.

Offeror bait and switch practices, whereby an offeror proposes the use of personnel that it does not expect to actually use during contract performance, have an adverse effect on the integrity of the procurement system and may form the basis for rejecting a proposal. This does not mean, however, that in every case an offeror must use the personnel it proposed or risk losing the contract for which it is competing. Where, for example, an offeror provides firm letters of commitment and the names are submitted in good faith with those individuals consent, the fact that an offeror, after award, provides substitute personnel does not make the award improper. RGI, Inc., B-243387.2; B-243387.3, Dec. 23, 1991, 91-2 CPD ¶ 572.

Here, the record shows that Fortier submitted letters of commitment even though the solicitation did not require them. Fortier explains that the two substitutions after award were necessitated by the fact that two individuals sought employment elsewhere because of delays in awarding the protested procurement. Under the circumstances, there is no basis to conclude that Fortier deliberately proposed personnel it did not intend to provide, particularly since it did not substitute for either of the only two key personnel that it was actually required to list.

The protest is denied.


Robert P. Murphy
General Counsel